Supreme Court, U.S.
FILED
DEC 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-656 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

DALE LYNN BREWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals was required to consider petitioner's claim that there was insufficient evidence to support his conviction on two counts before reversing his conviction on all three counts for trial error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 904 F.2d 936.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a-15a) was entered on June 19, 1990. A petition for rehearing was denied on July 24, 1990. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on October 22, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

An indictment filed on September 22, 1988, in the United States District Court for the Northern District of Texas charged petitioner and 23 others with conspiracy to

violate federal firearms laws, in violation of 18 U.S.C. 371 (Count 1). In addition, petitioner and seven co-defendants were charged with possessing an illegally manufactured destructive device (Count 2) and receiving an unregistered destructive device (Count 3), in violation of 26 U.S.C. 5861(c) and (d). Following a joint jury trial, petitioner and six co-defendants were convicted on the conspiracy count. Petitioner and co-defendants Ken Vodron and Joseph Parr also were convicted on Counts 2 and 3. Petitioner was sentenced to concurrent terms of five years' imprisonment on each count.

1. The evidence showed that petitioner and his co-defendants belonged to various chapters of the Bandido Motorcycle Club. On April 30, 1983, a member of the rival Banshee Motorcycle Club killed a member of the Bandido Club in Porter, Texas. Many of the Bandido Club's national officers attended the deceased Club member's funeral. Following the funeral, the Bandido officers met and planned to take revenge against the Banshee Club by killing Banshee members in Texarkana and Dallas. They agreed to meet in six weeks with a definite plan. In the interim, national Bandido Club officers received certain assignments, including the collection of $100 from each Bandido member to finance the retaliation effort, the acquisition of unregistered firearms, the formulation of a code that could be employed when conversing on the telephone, and the procuring of a safe house in north central Texas, where there was no local Bandido chapter. Pet. App. 1a-2a.

On June 13, some of the Bandido national leaders, including Vodron, Joe Benavides, and Crandle Presnel, met near the home of the president of the Longview, Texas, chapter. Also in attendance were officers of some of the local chapters, including petitioner, the president of the Houston Cloverleaf chapter. They discussed a plan to kill

all the persons present at the Texarkana Banshee clubhouse by conducting a drive-by and opening fire with two MAC-10 machine guns that had been illegally converted to fire fully automatically. That plan, however, was never carried out. Pet. App. 3a-4a, 5a.

On June 20, Vodron, Benavides, Presnel, and another national officer, John Hanson, drove to Dallas and located the homes of Banshee members who were to be targets of their retaliation. They decided to bomb several of the houses. On June 24 or 25, Vodron went to Houston and stole a quantity of explosives from a tool box on a company truck. Vodron injured himself while in Houston; accordingly, he enlisted petitioner to deliver the stolen explosives to Dallas. The next day petitioner arrived in Dallas with two canisters of explosives. Pet. App. 4a.

On June 26 or 27, the Bandido leaders, including petitioner, assembled in Longview. By that time, they possessed a variety of weapons, including explosives, blasting caps, pistols, hand grenades, and MAC-10 machine guns. Petitioner and three others went to a remote location outside of Longview and tested the blasting caps. Some of petitioner's co-defendants constructed two bombs, and Benavides and Hanson transported the bombs and other weapons to Dallas. On July 5, Benavides planted one bomb under a van belonging to a Banshee member while Presnel stood guard with a MAC-10 machine gun. That same day, Hanson planted the other bomb next to a gas meter attached to a house belonging to another Banshee member. Petitioner, armed with a MAC-10 machine gun, served as a lookout. Both bombs subsequently exploded, causing property damage but no serious personal injuries. Pet. App. 4a-5a.

2. Petitioner and the six convicted co-defendants appealed. The appeals were consolidated, but petitioner filed a separate brief. In a joint brief, four of petitioner's co-

defendants challenged the sufficiency of the evidence supporting their conspiracy convictions. Petitioner separately contended, among other claims of error, that the government's evidence was insufficient to convict him on Counts 2 and 3 and that he should have been granted a severance from the other defendants. As to the latter claim, petitioner alleged that he was prejudiced by the joint trial because the jury heard a government witness testify about out-of-court statements made by Vodron, a non-testifying co-defendant, that implicated petitioner, in violation of the principles of *Bruton* v. *United States*, 391 U.S. 123 (1968).

The court of appeals affirmed the convictions of petitioner's co-appellants, expressly rejecting their challenge to the sufficiency of the evidence. Pet. App. 7a-10a. As to petitioner, the court agreed that the district court committed a *Bruton* error that required the reversal of petitioner's conviction on all counts. *Id.* at 12a-13a. The court stated, "In light of this holding we do not address Brewer's other claims." *Id.* at 13a.

ARGUMENT

Petitioner contends that the court of appeals erred in failing to review his claim that there was insufficient evidence to support his convictions on Counts 2 and 3. A court of appeals, however, is under no constitutional obligation to review an appellant's challenge to the sufficiency of the evidence if the court decides to reverse a conviction for trial error. The court acted within its discretion in declining to decide the sufficiency issues in petitioner's case.

1. The Double Jeopardy Clause provides three guarantees. It protects a defendant against a second prosecution for the same offense after acquittal, it protects him

against a second prosecution for the same offense after conviction, and it protects him against multiple punishments for the same offense. *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). If a conviction is reversed on appeal for trial error, retrial generally is permissible. *E.g.*, *United States* v. *Tateo*, 377 U.S. 463, 465 (1964). If a conviction is reversed because the evidence was insufficient as a matter of law to support conviction, however, the Double Jeopardy Clause bars a retrial. *Burks* v. *United States*, 437 U.S. 1 (1978).

Petitioner argues that, "as a corollary to the *Burks* rule" (Pet. 4, 10-11), the court of appeals was constitutionally required to consider his claim that the evidence was insufficient to support his convictions on Counts 2 and 3. Although the court of appeals reversed petitioner's conviction on the basis of trial error, petitioner argues that the court should also have addressed his claim regarding the sufficiency of the evidence because if the court had found the evidence insufficient on Counts 2 and 3, the Double Jeopardy Clause would have protected him from a retrial on those counts. As petitioner concedes, "this [C]ourt has never specifically stated that legal sufficiency questions must be reached" (Pet. 4). The reason is plain. The Double Jeopardy Clause does not dictate to the court of appeals the order in which it must decide issues presented to it, nor does it remove from the court of appeals the discretion to decide an appeal based on a trial error without reaching a separate challenge to the sufficiency of the evidence. Rather, the "protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as acquittal, which terminates the original jeopardy." *Richardson* v. *United States*, 468 U.S. 317, 325 (1984).[1]

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[1] Petitioner notes (Pet. 4) that in a concurring opinion in *Justices of Boston Municipal Court* v. *Lydon*, 466 U.S. 294, 321-322 (1984),

2. Several courts of appeals have adopted a policy of reviewing a claim of insufficient evidence to support a conviction even after finding trial error. See, *e.g.*, *United States* v. *Douglas*, 874 F.2d 1145, 1150 (7th Cir.), cert. denied, 110 S. Ct. 126 (1989); *United States* v. *Palzer*, 745 F.2d 1350, 1352 n.4 (11th Cir. 1984); *United States* v. *Bibbero*, 749 F.2d 581, 585-587 (9th Cir. 1984), cert. denied, 471 U.S. 1103 (1985). The election of some courts to employ such a procedure, however, does not compel all reviewing courts to adopt it.[2]

Justice Brennan stated that "when a defendant challenging his conviction on appeal contends both that the trial was infected by error and that the evidence was constitutionally insufficient, the court may not, consistent with the rule of *Burks* v. *United States*, 437 U.S. 1 (1978), ignore the sufficiency claim, reverse on grounds of trial error, and remand for retrial." This Court, however, has not adopted that proposition. Indeed, the Court has stated that "our decision in *Burks* did not extend beyond the procedural setting in which [the case] arose" and should not be read to effect a "sweeping change in the law of double jeopardy." *Richardson* v. *United States*, 468 U.S. 317, 323 (1984).

[2] In *Douglas*, the court of appeals concluded that the additional expenditure of appellate resources used in resolving sufficiency questions was justified by the need to preserve the district court's "scarce and costly" trial resources, stating:

> [W]e are not convinced, in light of *Richardson*, that the Double Jeopardy Clause compels an appellate court to review the sufficiency of the evidence offered at trial anytime a defendant raises the question. We are, nevertheless, in order to accomplish the same purpose, prepared to adopt a policy in this circuit of routinely addressing evidentiary sufficiency in criminal cases when a defendant presents the issue on appeal. We need not anchor this policy in the Double Jeopardy Clause; rather, its rationale lies in our concern for the preservation of scarce and costly resources. All retrials involve duplicative efforts by judges, juries, prosecutors and defendants, at considerable expense in time and money to all, and in anxiety to the defendant. If in fact

Indeed, this case indicates why a compulsory rule of review, which results in a court of appeals' expenditure of its resources to preserve trial court resources (note 2, *supra*), is not always the best approach. As we have explained (pp. 2-4, *supra*), petitioner was convicted of conspiracy and two substantive violations of the firearms laws. On appeal, he attacked the sufficiency of the evidence as to only the two substantive counts. Thus, even if the court of appeals had reached petitioner's challenge to the sufficiency of the evidence and decided it in petitioner's favor, the government could retry petitioner on the conspiracy count. Deciding petitioner's sufficiency of the evidence claim would therefore not avoid a retrial in any event.

More importantly, until the government initiates retrial proceedings, petitioner's double jeopardy concerns are entirely speculative. Thus, a court of appeals can realize judicial economies by deferring consideration of the sufficiency of the evidence until the prospect of double jeopardy is squarely presented. Indeed, the courts of appeals that defer sufficiency issues provide for the resolution of such concerns when the threat of double jeopardy has ripened through the commencement of judicial proceedings. For example, the Fifth Circuit has held that if the government initiates a new trial, a defendant in petitioner's situation can oppose the retrial in district court on double jeopardy

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insufficient evidence is presented at a first trial, a retrial, on any basis, ordinarily may be expected to be a wasted endeavor.

874 F.2d at 1150. Relying on Justice Brennan's concurrence in *Lydon* (see note 1, *supra*), the Ninth and Eleventh Circuits suggested that the Double Jeopardy Clause requires a court of appeals to review sufficiency issues. See *Bibbero*, 749 F.2d at 586; *Palzer*, 745 F.2d at 1352 n.4. Those courts, however, made no mention of this Court's decision in *Richardson*, and may not have had the benefit of that recently decided case.

grounds through the reassertion of his undecided sufficiency arguments. *United States* v. *Sneed*, 705 F.2d 745, 748 (5th Cir. 1983).[3] If the district court rejects the defendant's double jeopardy objection, he may obtain appellate review of the district court's decision, which would include a review of the sufficiency of the evidence at the first trial. *Ibid.* See *Abney* v. *United States*, 431 U.S. 651 (1977). Alternatively, the defendant may wait until completion of the second trial and press the double jeopardy claim in the event of a second conviction. See *Douglas*, 874 F.2d at 1150-1151.[4]

Thus, petitioner will have ample opportunity to assert his claim of double jeopardy if the prospect of double jeopardy actually arises. He simply must await the government's decision whether to seek a new trial before raising that claim. As in *Lockhart* v. *Nelson*, 488 U.S. 33, 42 (1988), this "is not the sort of governmental oppression at which the Double Jeopardy Clause is aimed."

3. Petitioner also contends that this case calls for the exercise of the Court's supervisory authority to adopt a rule requiring appellate review of sufficiency claims before

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[3] See also *United States* v. *Marolda*, 648 F.2d 623 (9th Cir. 1981); *United States* v. *United States Gypsum Co.*, 600 F.2d 414, 416 (3d Cir.), cert. denied, 444 U.S. 884 (1979); compare *United States* v. *Jelsma*, 630 F.2d 778 (10th Cir. 1980) (rejecting a double jeopardy appeal on the ground that the sufficiency issue was resolved against the defendant in the first appeal).

[4] In *Sneed*, the Fifth Circuit suggested that the Eleventh Circuit may have foreclosed such an appeal in *United States* v. *Bizzard*, 674 F.2d 1382, cert. denied, 459 U.S. 973 (1982). The Eleventh Circuit reasoned, however, that it had implicitly rejected the appellant's challenge to the sufficiency of the evidence in the appellant's first appeal and that the prior decision controlled in the second appeal. 674 F.2d at 1386. That result is consistent with the Eleventh Circuit's policy of resolving sufficiency issues even when it reverses a conviction based on trial error. See *Palzer*, 745 F.2d at 1352 n.4.

a case is returned to the district court. Pet. 7-9. This Court has exercised that authority for three limited purposes: to implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and to remedy illegal conduct. *United States* v. *Hasting*, 461 U.S. 499, 505 (1983). None of those purposes is advanced here. No identifiable right has been violated, there is no issue of matters improperly considered by the jury, and no illegal conduct is present that requires remedying. Petitioner does not argue otherwise. At most, he points to the fact that the court of appeals' resolution of the sufficiency issues might eliminate the need for litigation in the district court or court of appeals at a later time. Pet. 8-9. That possibility is an insufficient reason to require appellate disposition of speculative issues—particularly where review at a subsequent stage will maintain the orderly process of a case and will not disrupt the administration of the criminal laws.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1990

U.S. GOVERNMENT PRINTING OFFICE 1990—282 061/20265